IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

77-1850

CORINNE GRACE,
Petitioner,

vs,

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, CORRINNE GRACE, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings on April 28, 1978.

The Opinion Below

The Memorandum Decision of the Ninth Circuit Court of Appeals is unreported at this time and appears herein as Appendix A. No other written opinions have been delivered.

Jurisdictional Statement

Petitioner seeks review of the judgement of the Ninth Circuit Court of Appeals entered April 28, 1978. See Appendix A. That ruling was filed and entered on April 28, 1978. A petition for rehearing was filed May 9, 1978.

At this writing, petitioner has not received a ruling on her petition for rehearing, however, petitioner is filing this petition for a writ of certiorari in order to comply with the time requirements of Rule 22(2), Rules of the Supreme Court, Title 28 United States Code. This petition for certiorari was filed less than 30 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Appellant was tried and convicted of aiding and abetting a bank officer in the willful misapplication of bank funds, a federal crime having specific criminal intent to defraud as an essential element. Lack of intent to defraud on the part of the bank officer, the principal, was the critical hingepin of petitioner's defense at the trial. The bank officer testified that his motive in honoring petitioner's overdrafts was to

keep petitioner as a client since she was his largest account, that he always expected that the money would come in to cover the account, and that he acted in what he perceived to be the best interests of the bank, trying his best to hold on to a valuable client and keep this large account for the bank. The prosecutor himself described the bank officer as "a sucker or simply an honest fool". (RT 520).

At the trial, the jury was instructed, over defense counsel's objection:

> Now, an intent to injure or defraud, as contemplated by the statute, is not inconsistent with the desire for the ultimate success and welfare of the bank. A wrongful misapplication of the funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is none the less a violation of the statute, if the necessary effect is or may be to injure or defraud the bank. (RT 569).

The questions thereby arising are:

1. Did this "Mann" type instruction effectively negate the requirement of a finding by the jury of specific intent to defraud or injure the bank, impermissibly shift the burden of proof to the defendant and conflict with presumtion of innocence, thus constituting reversible error?

2. Was there insufficient evidence that the principal, the bank officer, had the requisite intent to defraud in order to convict appellant as an aidor and abettor, where there was no evidence of any profit motive on the part of the bank officer (RT 59-66, 62, 257), the bank officer testified he believed petitioner had ample funds to meet her indebtedness to the bank, that he honored petitioner's overdrafts to keep what he considered his largest account and valuable customer to the bank, (RT 256-257) and the prosecutor described the bank officer as "a sucker or simply an honest fool"? (RT 520).

Statutory Provisions Involved

Title 18 of the United States Code, Section 2, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 of the United States Code, Section 656, states:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Statement of Facts

1. Jurisdictional Facts.

An indictment (CR 1) was filed herein on January 5, 1977, charging violations of Title 18, United States Code, Sections 2 and 656. Petitioner was arraigned in absentia and entered a plea of not guilty on January 19, 1977. (CR 16). On March 9, 1977 a superseding indictment was filed. (CR 60).

The case came on for trial on April 4, 1977, before United States District Judge Martin Pence (CR 80). Petitioner had a trial by jury (CR 84) and the jury found the petitioner guilty as indicted in Count 1 of the indictment on April 7, 1977. (CR 143). On April 27, 1977, Judgement was entered and petitioner was sentenced to custody for a period of one year and one day and a $5,000.00 fine imposed.

A Motion to Stay Execution of Sentence and for Release Pending Appeals (CR 170) was filed March 4, 1977 (CR 171) and a Notice of Appeal was filed on May 9, 1977 (CR 174). Petitioner was released on her own recognizance subject to the terms and conditions of the Court Order entered on May 16, 1977. (CR 180).

The Trial Court has jurisdiction by way of provisions of Title 18, United States Code 656, 2. The United States Court of Appeals for the Ninth Circuit had jurisdiction under Title 29, United States Code, Section 1291.

2. Facts Pertaining to the Issue Presented.

The evidence adduced at trial was that petitioner had overdrafted her checking account in the sum of nine hundred twenty eight thousand four hundred eighty six dollars and eight cents. ($928,486.08) (R.T. 73-74). This was accomplished largely through the actions of a branch manager of the Bank, Mr. KENNETH MILLER, (RT 86-90) who was indicted as the principal in this case, pled guilty to count I of the Indictment, (RT 263) and received probation.

Upon discovery of the overdraft by Mr. MILLER'S superiors at the Bank, a loan agreement was executed by petitioner, her husband, and the bank, collateralized by property having a value of 125% the amount of the loan. The note provided for interest at the rate of 10% on the overdrafts, attorneys fees, costs to the bank and substantial overdraft charges. Additionally, the note provided that should the collateral be diminished the bank had the right to demand additional collateral. (RT 113-120, 122-123, 137-138).

The crux of petitioner's defense at trial was that Mr. MILLER lacked the requisite intent to injure or defraud the bank, therefore petitioner could not be convicted as an aidor and abettor. In support of petitioner's contention that Mr. MILLER lacked the requisite intent to defraud was the testimony of Mr. MILLER that he never at any time received any favors, gifts, or monies from the Graces for any of his actions on behalf of petitioner at the bank. (RT 220-221). MILLER testified "he did not receive a nickel out of this transaction...and thought ultimately they [petitioner and her husband] would get the money to cover the overdraft." (RT 248).

MILLER testified that his motives in honoring petitioner's overdrafts were:

> "To keep the Graces as a client since they were his largest single account, one.
>
> No. 2. He felt the situation was only a temporary problem and was confident that the Graces had sufficient assets to fully protect the Bank from any loss".(RT 253).

Mr. MILLER testified that there was always the expectation the money would come in to cover the account and that he called petitioner day after day trying to get the money to cover the account. (RT 254). Additionally, Mr. MILLER testified there was never any idea in his head that he wanted to injure or defraud the bank and that he believed once the matter was straightened out, petitioner would be a good customer for the bank. (RT 256-257).

The trial judge instructed the jury, over the objection of defense counsel, that:

> Now, an intent to injure or defraud, as contemplated by the statute, is not inconsistent with a desire for the ultimate success and welfare of the bank. A wrongful misapplication of the funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is nonetheless a violation of the statute, if the necessary effect is or may be to injure or defraud the bank.
>
> The ultimate or future possibility or probability of benefit to the bank, that's not a defense to aiding and abetting a misapplication of bank money and funds. (RT 569).

Additionally, the jury was instructed in pertinent part:

> Now to establish the offense charged in the Indictment the Government must prove that a crime was committed by Kenneth Miller...(RT 564).
>
> ...you do have to pass upon whether or not the Government has proved beyond a reasonable doubt that Miller committed the illegal act charged (RT 575-576).

After the jury had deliberated for a considerable period of time it became apparent there was confusion among the jurors as to whether they were required to deliberate on the charges concerning petitioner only, not Mr. Miller. The jury submitted to the court two notes indicating that one of the jurors "thought that the jury was to deliberate on the charges concerning Mrs. GRACE only, not Mr. Miller." (RT 581). In an attempt to clarify this confusion the Judge gave supplemental instructions to the jury, most of which were accurate, however, the jury was instructed in pertinent part:

> *If you should find that Miller did not commit the crime charged,* irrespective whether he pled guilty to it or not, *that's immaterial.* (RT 582).

Petitioner contended on appeal to the Ninth Circuit Court of Appeals that her conviction should be reversed because a prejudicial so-called "Mann" instruction was given to the jury concerning the issue of intent to defraud or injure the bank. The decision of the Ninth Circuit Court of Appeals affirmed appellant's conviction without addressing the issue of the so-called "Mann" instruction stating that the instructions fairly and accurately reflect the applicable law. (Appendix A attached hereto). That ruling was filed and entered on April 28, 1978. A petition for rehearing was filed May 9, 1978, on the grounds that the Ninth Circuit overlooked appellant's argument concerning use of the "Mann" instruction. At this writing appellant has not received a ruling on her petition for rehearing and is filing this writ of certiorari in order to comply with the time requirements of Rule 22(2), Rules of the Supreme Court, Title 28 United States Code.

Reasons for Granting the Writ

The United States Circuit Courts of Appeals are in conflict concerning the propriety of the so-called "Mann" type instruction such as was given in petitioner's case. This issue has spawned a vast progeny of litigation and is of a recurring nature in federal white-collar criminal cases having intent as a requisite element. The Supreme Court should grant certiorari to decide this issue once and for all and to provide guidance to the Circuit Courts in this area due to the increased emphasis on white-collar criminal prosecutions by federal law enforcement agencies and the consequent increase in white-collar prosecutions burdening the federal judicial system.

Probably no other jury instruction has ever received so much attention and criticism, particularly in the Fifth and Ninth Circuits, as the so-called "Mann" instruction. Despite its criticism, the "Mann" instruction has continued to "rear its ugly head once again. This charge is so infamous that in the standard text on federal jury instructions its use is referred to as an invitation to reversible error." *United States v. Chiantese,* 546 F. 2d 135, 136 (5th Cir. 1977); Devitt and Blackmar, Federal Jury Practice and Instructions. 1970 § 13.06 p. 277.

Rule 19(b) Supreme Court Rules, Title 28, United States Code, indicates that a substantial reason for granting certiorari is to resolve a conflict among the Circuit Courts of Appeals on the same matter. A number of cases have similarly recognized this concept. *Chaffin v. Stynchcombe,* 412 U.S. 17 (1977), F.T.C. v. Flotill Products, Inc., 389 U.S. 179 (1967); *United States v. Behrens,* 735 U.S. 162 (1963); *Downum v. United States,* 372 U.S. (1963); *Prince v. United States,* 352 U.S. 322 (1956); *Rex Trailer Co. v. United States,* 350 U.S. 148 (1956); *Affronti v. United States,* 350 U.S. 75 (1955).

Consequently, the so-called "Mann" instruction issue should be resolved by this court because of the continual recurrence of that question and the ambiguous use of that instruction.

See, *Cohen v. United States,* 378 F. 2d 751, 755 (9th Cir. 1967), cert. den. 389 U.S. 897; *United States v. Chiantese,* 546 F. 2d 135, 136 (5th Cir. 1977). *United States v. Robinson,* 545 F. 2d 301 (2d Cir. 1976); *United States v. Arthur,* 544 F. 2d 730, 736 (4th Cir. 1976); *United States v. Barash,* 365 F. 2d 395 (2d Cir. 1966).

At least two Circuits, the D.C. Circuit and the Sixth Circuit have held use of "Mann" type instructions did not constitute reversible error, although they did so with some reservation. *United States v. Moore,* 435 F. 2d 113, 116 (D.C. Cir. 1970); *United States v. Haldeman,* 559 F. 2d 31, 116 (D.C. Cir. 1976) cert. denied 97 S. Ct. 2641; *United States v. Releford,* 352 F. 2d 36, 40 (6th Cir. 1965) cert. denied, 86 S. Ct. 562. The above cited authorities indicate there is substantial conflict and confusion among the Circuits on the "Mann" instruction. Certiorari should be granted to resolve the conflict and provide guidance to the lower courts.

Conclusion

This Court has not directly considered the issue whether "Mann" type instructions effectively negate the

requirement of a finding of specific intent, impermissibly shift the burden of proof on this issue to the defendant, and conflict with the presumption of innocence, thus constituting reversible error. Due to the conflict among the Circuits on this issue and its recurring nature and confusion in this area, it is respectively submitted that this Court should exercise its supervisory power and grant a writ of certiorari to review petitioner's case and resolve this issue once and for all.

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Appellee,

No. 77-2139

v.

MEMORANDUM

CORINNE GRACE,
Appellant,

Appeal from the United States District Court for the District of Arizona

Before: ELY and GOODWIN, Circuit Judges and ENRIGHT, District Judge*

Appellant was convicted of aiding and abetting a violation of Title 18, U.S.C. 656 (intentional misapplication of funds by a bank officer of employee). Appellant Grace was indicted along with the bank manager of The Arizona Bank, Kenneth Miller, after the bank discovered that there was a hidden overdraft of nearly one million dollars in her checking account. Miller entered a plea of guilty to a violation of 18 U.S.C. 656 and testified at length at Appellant's trial. That testimony revealed that Miller manipulated check processing procedures in order to hide the overdraft from senior bank officers.

Appellant contends that there was insufficient evidence for the jury to find that Miller intended to defraud the bank. Obviously, unless the government established that Miller had committed a violation of Section 656, Appellant's conviction for aiding and abetting cannot stand. Appellant buttresses her argument by reference to testimony by Miller which indicates that he did not want the bank to be injured in any way and that his primary motivation for engaging in the scheme was to retain a valuable customer.

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

However, Appellant confuses the terms "motive" and "intent." The requisite intent to defraud is present "if a person acts knowingly and if the natural result of his conduct would be to injure or defraud the bank even though this may not have been his motive..." *United States v. Beran,* 546 F. 2d 1316, 1321 (8th Cir. 1976), quoting from *United States v. Schmidt,* 471 F. 2d 385, 386 (3rd Cir. 1972). In reference to whether a bank manager had sufficient intent to injure a bank under Section 656, this court has stated that "...the fact that the Branch Manager and the defendant intended that the uncompensated use should be temporary and that the funds should ultimately be restored does not alter the case." *Benchwick v. United States,* 297 F. 2d 330 (9th Cir. 1961). Similarly, the Sixth Circuit has commented:

> "An intent to injure or defraud, as contemplated by the statute [18 U.S.C. 656], is not inconsistent with the desire for the ultimate success and welfare of the bank.... A wrongful misapplication of funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is none the less a violation of the statute, if the necessary effect is or may be to injure or defraud the bank." *Galbreath v. United States,* 257 F. 648, 656 (6th Cir. 1918), relied on in *United States v. Boedker,* 389 F. Supp. 360 (M.D. Pa. 1974).

A probability of loss, not actual loss to the bank is all that is needed to establish an intent to defraud. *United States v. Beran, supra* at 1322, citing *United States v. Bevans,* 496 F. 2d 494 (8th Cir. 1974), *United States v. Sorenson,* 330 F. Supp. 642, 644 (D.C. Mont. 1971), and *Johnson v. United States,* 95 F. 2d 813, 816 (4th Cir. 1938). At the time of the alleged illegal acts, Appellant was experiencing a severe cash flow problem which indicated that there was a real probability that she would not be able to repay the one million dollar overdraft. Additionally, the bank suffered an actual loss as a result of Appellant's scheme—to wit, the freedom to invest and loan its funds at its own discretion.

Viewing the evidence in the light most favorable to the government and giving the government the benefit of all inferences that reasonably may be drawn from the evidence,

Glasser v. United States, 315 U.S. 60, 80 (1942), there was sufficient evidence for the jury to find that Miller intended to defraud or injure the bank.

Appellant also challenges the instructions given regarding proof of Miller's intent and the relevance of restitution. The instructions on both of these points fairly and accuratley reflect the applicable law and thus were not erroneous.

Appellant also claims that it was error for the trial court to admit evidence which related to counts of the indictment which were dismissed prior to trial. The evidence, which revealed prior acts of misconduct by Appellant, was properly admitted pursuant to Federal Rule of Evidence 404 (b) to prove motive or intent. The jury was properly instructed as to the limited purpose of the evidence.

Appellant claims that certain remarks in the government's closing argument were inflammatory and prejudicial. At trial, defense counsel objected to only one of those remarks. The trial court denied the defense motion for a mistrial upon a finding that the challenged statement, taken in the overall context of the closing argument, was not misleading or erroneous. This court gives great deference to the trial court, which saw and heard the actual events and found no prejudice. See, *Orebo v. United States,* 293 F. 2d 747 (9th Cir. 1961).

As to those remarks which were not objected to at trial, none of them was so prejudicial as to require reversal by this court, particularly in view of the fact that the trial court did not have an opportunity to rule on the objection.

AFFIRMED.